CRIMINAL ORGANISATIONS CONTROL BILL 2011

Introduction and First Reading

Bill introduced, on motion by **Mr C.C. Porter (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR C.C. PORTER (Bateman — Attorney General) [12.24 pm]: I move —

> That the bill be now read a second time.

There is no question that the influence of criminal organisations in this jurisdiction is a significant law enforcement issue. Police figures provided to *The Sunday Times* last year show that in the two years prior, some 135 patched members of outlaw motorcycle gangs had been charged with over 600 offences, many of a serious nature such as extortion, drug dealing and abduction. Those same police sources revealed that almost half of WA's outlaw bikie gang community and members had faced serious criminal charges in the previous two years.

Other figures contained in the police information are in some respects even more concerning. WA Police revealed that between 2008 and 2010 they had seized almost 18 kilograms of amphetamines, worth some $13 million, from gang members. In the two years prior to 2009 police had seized 111 illegal firearms, of which 84 were from outlaw motorcycle gang members and associates. Without labouring the point, these figures may represent the tip of the iceberg especially as it is the case that OMGs are just one of a number of groups or organisations involved in criminal activity and, more importantly, these groups are now fighting each other for market share. Recent incidents on the east coast of Australia and here in Perth illustrate that these groups have no qualms whatsoever in putting the public at risk in resolving their inter-gang disputes.

Across Australia communities have had enough of these activities, and governments across the nation, both state and commonwealth, have acted using appropriately tough but highly targeted legislation. Whilst the introduction of this legislation in two other states (South Australia and New South Wales) has been the subject of successful challenges in the High Court, Western Australia has the advantage of the High Court decisions providing us here in Western Australia with guidance about the most constitutionally valid approach. More importantly, the New South Wales decision found that there is nothing constitutionally or legally objectionable about the principal underlying objectives of these laws.

At this point it is opportune to assure the Parliament and the people of Western Australia that this legislation is aimed at organisations that harbour and encourage criminal activities. It is not aimed at people who enjoy riding motorcycles as a group, organisations who show their skills with firearms at competitive meetings, or organisations and clubs who like to distinguish themselves by wearing badges and other regalia.

Although the long title of the bill clearly outlines its legislative intent, I want to make it very clear to the house what the government's policy intentions are with respect to this legislation. Quite simply they are to directly disrupt the activities of organisations that exist for the purpose of harbouring and encouraging crime by providing increased monitoring of, placing restrictions upon and providing for the incapacitation of members. In addition the legislation is aimed at deterring persons from becoming involved in organised crime groups and, more generally, to deter such organisations from being involved in any criminal activity in this jurisdiction.

Critical to understanding the policy intent of this legislation is not just the legal definition of a criminal organisation, which is contained in clause 13 of the bill, but also research that informs us as to the nature of criminal organisations themselves. Research in Canada has identified three types of criminal organisation —

> economic criminal organisations — those organisations set up for the sole purpose of achieving material gain for members via criminal activity;
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> social criminal organisations — those organisations that support the economic activities of their members only indirectly, but whose membership creates a sense of solidarity, trust and secrecy, promotes a deviant—i.e. non-law abiding—ideology and provides a forum to share criminal and non-criminal information and thereby provide criminal opportunities to members; and quasi-governmental criminal organisations — organisations that formally govern and control criminal activities within their sphere of influence by making and enforcing rules and codes of conduct for criminal activity in a specific area and seeking to control all such activity in that area.

These categories are clearly not mutually exclusive but they provide us with a succinct description of the sorts of governance arrangements that criminal organisations may have. They also help to explain that, whilst outlaw motorcycle gangs have the highest profile in the community, they are not necessarily the only organisations to

which these descriptions fit. So let us be clear: the targets of this legislation are all these types of criminal organisation or any combination of them, irrespective of what the particular organisation's public name might be.

Finally, before moving to describe the key features of the bill before the house, I would like to outline how the bill, once enacted, will function. Firstly, taking all of the above into account, there is no question whatsoever that members of these organisations—I may refer to OMGs for brevity's sake—will frequently commit criminal offences, which means that using offences as triggers for particular consequences under this bill is an effective and appropriate approach. Secondly, it is recognised that in many cases it might not be possible to disable or disband a criminal organisation simply by jailing its leader, because leadership of the organisation may not necessarily be involved in direct oversight of all the criminal activity committed by that group. Rather, what is needed, and I believe the bill I introduce today will achieve this, is constant and consistent pressure over a period of time through surveillance, arrests, confiscations and imprisonment, to break down associations, break open the culture of secrecy, reduce the profitability of associated activities and incapacitate individual members where and as appropriate. Thirdly, the key operative functions within the bill need to be flexible and varied. Given the financial and legal resources available to organised crime, I am fully aware that every step of this legislation is likely to be litigated, and possibly some parts subject to constitutional challenge. Given the onerous and time-consuming nature of such challenges, it is the government's intent with this bill that its key features are sufficiently targeted, stringent and varied to make the legislation a worthwhile tool for our state's police and prosecution authorities.

I now turn to the key features of the Criminal Organisations Control Bill 2011. Much of what follows in the bill hinges on the operation of part 2; that is, the process for declaring an organisation a criminal organisation. Many of the features of the application process under part 2 are similar to those in operation in New South Wales. However, to reflect the situation in Western Australia, clause 7(1) enables both the Commissioner of the Corruption and Crime Commission and the Commissioner of Police to be applicants. Other key features governing the application process for a declaration shared with the New South Wales legislation include —

> the use of a "designated authority" to determine applications for a declaration. Division 4 of part 2 describes the process of designating a judge or retired judge as a "designated authority". It is worth noting in this regard that in the High Court's decision regarding parts of the New South Wales legislation, being the decision in Wainohu v The State of New South Wales [2011] HCA 24 (23 June 2011), the High Court said nothing adverse in respect of the powers to make a declaration order being vested in a single designated authority;
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> the ability for the applicant to submit "criminal intelligence information"—part 5—in a declaration hearing. This effectively prohibits parties, other than the applicant and the designated authority, from access to the information by placing an obligation on the designated authority to take all reasonable steps to maintain the confidentiality of information classed as criminal intelligence information;
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> an ability for members of the organisation—that is to say, respondents—subject to an application for a declaration, and certain other persons, to provide a "protected submission" under clause 11. A protected submission can be made by a person who feels that they or their family may be harmed, threatened or intimidated in reprisal for making a submission; and
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> in relation to the High Court's decision in Wainohu, clause 14 is critical. It ensures that the designated authority must provide reasons for its decision.

A declaration, once made by the designated authority, lasts for five years—clause 16—unless renewed or revoked. An application for renewal can be made only by the Commissioner of Police or the Commissioner of the Corruption and Crime Commission, whereas either of these two officers, the declared criminal organisation itself or a member, or former member, if the organisation no longer exists, can apply for the revocation of a declaration under clause 19. Importantly, refusal to consider an application under this clause and any decision to either revoke or not revoke a declaration again requires the designated authority to provide reasons—clause 22.

As indicated earlier, the full effect of this legislation generally involves a two-stage process starting with the declaration of an organisation as a criminal organisation and subsequent publication of this status. Once this has occurred, a number of consequences may follow. An immediate effect is that it is an offence for anyone to recruit for the declared organisation under clause 107; and, secondly, it allows for the Commissioner of Police to apply to the Supreme Court for a control order against an individual who is a member of the declared criminal organisation. However, the Commissioner of Police can also seek a control order against any person who is, or purports to be, a member of a declared criminal organisation, or has ongoing involvement with the organisation, or is a person who engages in, or has engaged in, serious criminal activity or regularly associates with members of a declared criminal organisation or other people who engage in serious criminal behaviour. As mentioned

previously, these are specific circumstances and dispel fears that the average motorcycle club member could get caught up in legislation of this type.

Key features of this process are —

> first, this will generally be a two-stage process involving an application for an interim control order under division 2, clause 35, followed by the making of a final control order under division 3, although provision is made for an application for a final control order to be made directly under clause 52. In a sense, this process is not dissimilar to the way restraining orders can be applied for at present. Clause 37(a) allows for applications for interim orders to be ex parte;
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> secondly, clause 38(2) allows the court to hear and determine two or more applications for an interim control order at the same time;
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> thirdly, criminal intelligence information can also be protected in interim and final hearings—clause 34;
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> fourthly, again, to reflect the targeted nature of this legislation, an application for a control order against a person can be made only when the person is a member of an organisation that has been declared a criminal organisation, or the person is a former member of a declared organisation and has ongoing involvement with the organisation, or the person, not being a member of such organisation, engages in, or has engaged in, serious criminal activity and regularly associates with members of a declared criminal organisation or regularly associates with persons who engage in, or have engaged in, serious criminal activity;
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> fifthly, similar to the checks and balances regarding declarations, subdivisions 3 and 4 of division 2 of part 3 allow for applications for the revocation and variation of an interim control order, and subdivision 5 of division 3 of part 3 provides for appeals, variations and revocations of a control order; and
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> finally, all the conditions that can be applied for under a final control order can be applied to an interim control order—these will be discussed in more detail shortly.

In line with the government's intent to disrupt and restrict the criminal activities of members of declared organisations and in line with similar legislation in other states, the conditions that can apply to either an interim control order or a control order are categorised as "standard conditions", set out in division 5, subdivision 1, and "non-standard conditions", set out in division 5, subdivision 2. The standard conditions of a control order are that the person is not able to associate with another person subject to an interim control order or a control order, although there are some limited exceptions to this; the person is not to receive funds from, provide funds to, or collect funds for or on behalf of a declared organisation; the person cannot be involved in any aspect of the organisation of any event open to the public; and the person cannot recruit others to become members of a declared criminal organisation. Non-standard conditions that can be imposed at the discretion of the Supreme Court include a prohibition on carrying on any prescribed activity, which includes but is not limited to, pursuant to clause 80, working in the gambling, betting, motor vehicle and security industries, as well as a category of occupations to be prescribed by regulation; the prohibition of the possession of firearms and other forms of weapons; the prohibition of the person under control from certain places pursuant to clause 79(1)(c); and the prohibition of the person under the control order from accessing one or more forms of communication or technology specified in the order.

Subdivision 5 of division 3 is an important part of the balanced approach taken by the government in dealing with criminal organisations. Not only does it contain provisions for variations and revocations similar to those in place for declarations, but also this subdivision includes an appeal provision available to both parties against either the granting of an order or the refusal to grant an order. The appeal is to be to the Court of Appeal and the provisions—clauses 64, 65 and 66—generally follow normal appeal processes.

Division 4 of part 3, dealing with control orders, implements government policy in that juveniles aged 16 and 17 years, if they become involved in criminal organisations and meet the grounds for making a control order, may be subject to the same conditions as adults. Clause 75 provides a safeguard in relation to juveniles in that the order has to be served personally if the juvenile was not present in court when the order was made.

Before turning to the offence and penalty provisions in part 4 of the bill, it is worth examining in some detail the other provisions of division 5 of part 3. These provisions give police significant new powers in relation to persons the subject of a control order, such as requiring the controlled person to attend at a police station to have identification particulars taken, which could include a DNA profile, and power to require a person suspected of being a controlled person who is associating with another controlled person to disclose identification details.

Whilst parts 2 and 3 are concerned with the application process and the making of declarations and control orders, part 4 sets out various offences and penalties associated with control orders. Subdivision 1 deals with the

most obvious offence—that of breaching a non-association condition of a control order. The penalty and the escalating penalty for subsequent offences of the same nature reflect the government's intent to restrict and disrupt these criminal organisations and to provide a significant deterrence to both individuals under control, and more broadly to other members of criminal organisations. Clause 100(3) particularly reflects the government's response to a common characteristic of many members of these organisations; that is, thumbing their nose at the law. Subdivision 2 covers financing offences and here the penalty is even higher. Subdivision 3 deals with other offences under this bill that can be regarded as having been committed by a person under a control order. The penalty for failing to provide identity information or providing false identity information is 12 months' imprisonment under clause 105.

Division 2 of part 4 goes to the heart of the government's intention to ensure that it becomes increasingly difficult for criminal organisations to recruit new members. Membership and revenue are critical for these organisations, so are premises from which they operate—a matter that is to be addressed shortly. Clauses 107, 108 and 109 introduce new offences of recruiting members for declared criminal organisations; owning, occupying, leasing or managing premises that are habitually used by members of a declared criminal organisation; and allowing a controlled person to use or have access to a firearm in contravention of a control order. The penalties for these offences range from a fine of $4 000 to imprisonment for two years.

Whilst dealing with offence provisions contained within this bill, I might take the opportunity, although somewhat out of sequence, of dealing with matters contained in part 10 headed "Amendments to other Acts". This part makes amendments to a number of acts but I will concentrate on the Criminal Code and the Sentencing Act. This part represents somewhat of a departure from the format of some corresponding interstate legislation consistent with the dual aims of this legislation; namely, to disrupt and restrict the activities of organisations involved in serious criminal activity and to deter persons from remaining in or becoming new members of organisations that harbour and encourage criminal activity. Part 10 introduces a number of new offences to apply to criminal organisations, whether declared or not; and a number of new penalties for persons who are convicted of certain offences committed in connection with a declared criminal organisation, including mandatory imprisonment in defined circumstances. With respect to those critics of mandatory imprisonment, the circumstances in which they are to apply should be made clear. New section 9C describes the principal objectives in sentencing for offences to which this new section applies; they are, the denunciation of the activities of these declared criminal organisations, their members and associates, and the consideration of the protection of the community in sentencing. New section 9A describes the offences and the circumstances of the offences that will result in the imposition of a mandatory term of imprisonment. Firstly, mandatory sentences will apply only if an offence was committed by an offender at the direction of a declared criminal organisation, or in association with members of a declared criminal organisation, or for the benefit of a declared criminal organisation. If the offender at the time of the commission of the offence was himself or herself a member of a declared criminal organisation, there is a presumption that the offence was committed in all of these circumstances unless the offender can show otherwise. Secondly, the offender has to be convicted of either an indictable offence—whether or not it was an either-way offence—or a relevant offence, which is a simple offence listed in the new schedule 1A to be included in the Sentencing Act. Simply put, any offender who meets these new criteria will mandatorily receive one of the following imprisonment terms —

> if the offence is indictable, even if dealt with summarily, the mandatory penalty is 75 per cent of the statutory maximum period of imprisonment, which applies on conviction on indictment, with a minimum of two years. If imprisonment is not ordinarily available for the offence, a term of two years' imprisonment must be imposed;
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> if the statutory maximum period of imprisonment is life imprisonment for the particular offence, the mandatory penalty is a minimum of 15 years' imprisonment;
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> if the offence is a "relevant offence" as listed in new schedule 1A of the Sentencing Act, the mandatory penalty is a minimum period of two years' imprisonment; and
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> except in the case of life imprisonment upon conviction for murder, where the bill provides that the offender cannot be made eligible for parole for at least 20 years, all other mandatory terms of imprisonment will be served without parole.

The government makes no apology for these measures. Information provided to the government recently by WA Police indicates that between January and July of this year some 223 members, associates or nominees of outlaw motorcycle gangs have been charged with some 416 offences, most of which involve drugs in one way or another.

Clause 108 also represents a significant provision as far as the government is concerned. This provision targets a person who is either the owner, lessee, occupier or concerned in the management of premises that are used habitually—that is, with some degree of regularity and frequency—by members of a declared criminal

organisation. Here I need to make it clear that this provision applies to members of a declared organisation whether or not they are the subject of control orders. It will be noted that clause 108(3) and (4) enact a presumption to be rebutted by the accused that the owner, occupier, lessee or manager of the premises knowingly allows the premises to be used in such a manner if the person himself or herself is a member of the declared criminal organisation. It should also be noted in passing that the offence as reflected by its penalty is a "confiscation offence" under the Criminal Property Confiscation Act 2000.

Parts 5 and 6 of the bill concern information presented to the decision maker and the recording and storage of information about organisations that have been declared and individuals who have been placed under control orders. Part 5 concerns the protection of criminal intelligence information on actual or suspected criminal activity and information about any police operation methods or procedures. Whilst courts should be as open as possible, the proactive stance of parts of this legislation means that this sort of information is critical for either the designated authority or the Supreme Court when considering grounds for making a declaration order or a control order.

Part 6 simply requires the Commissioner of Police to keep a record of declared organisations and individuals under control orders. This record will also involve declaration and control orders made in another state or territory that are reciprocally recognised in WA under part 7, and the record is to be made publicly available.

This leads us to another key section of the bill, divisions 2 and 3 of part 7, which deal with reciprocal recognition of interstate declarations and control orders. There is little doubt that organised crime is transnational, and it is well known that the organisational structures of outlaw motorcycle gangs allow for chapters to be formed in states and parts of states and territories. This phenomenon is well recognised by the commonwealth and state and territory governments, which have worked together through the Standing Council on Law and Justice—formerly the Standing Committee of Attorneys-General, which body used to be called SCAG. Whilst not advocating uniform legislation, this group of attorneys is committed to ensuring that all states and territories have largely consistent legislation. This legislative response is a key component of a broader plan by the commonwealth and the states to respond to organised crime with all the means at their disposal. Part 7, division 2, implements these commitments with regard to declarations. Mutual recognition is not automatic in the legislation and requires an application to be made to the relevant Western Australian authority. However, most of the processes are largely administrative. Subdivisions 1 to 8 cover these administrative arrangements.

Division 3 mirrors many of the administrative processes in division 2 and deals with the mutual recognition of control orders. Of note regarding this division is that in dealing with control orders flexibility is provided by clause 138, which allows Western Australia to adapt an order made in another state, when necessary, for its effective use in this state. This determination has to take place in a court rather than by a registrar. The other key issue in the reciprocal recognition of control orders is that should a variation to the conditions of a control order occur in the other state, or in fact, the order is revoked in the other state, an administrative process in subdivision 8 is envisaged for effecting these changes as quickly as possible in this state. Other provisions of note are that the Commissioner of Police in this state can apply to a registrar in WA to cancel the interstate order and, similarly, a respondent to an interstate order can apply to the court, not the registrar, for cancellation of the registration of the order in this state.

Parts 8 and 9 of the bill are administrative in nature. As members have become aware during the course of this outline, it is clear that this is unprecedented legislation for Western Australia and, I am sure, some will say it restricts the basic rights of a group of people. As has been noted previously, the government does not apologise for this in the interests of the wider constituency of law-abiding Western Australian citizens. Nevertheless, as the bill contains significant powers for the Commissioner of Police, the government is particularly mindful of having appropriate checks and balances on the additional powers to deal with the scourge of organised crime. Part 8, division 1, requires the Ombudsman to monitor and report to the Parliament on the exercise of the powers conferred on the commissioner and police officers. For the period before which the act is to be reviewed the Ombudsman will report each year. Following this, division 2 requires the act to be reviewed after five years.

Part 9 comprises a number of miscellaneous provisions. It is necessary to draw members' attention to just one—that is, clause 166, "Costs in proceedings under this Act". No doubt many aspects of this bill will be subject to extensive litigation. The government is mindful of this and intends to limit the awarding of costs against a party to situations in which either the state or the respondent has unreasonably contributed to the institution or continuation of the proceedings calculated to prolong the case unnecessarily or cause unnecessary expense.

The final part of the bill is part 10. I have already described changes to the Sentencing Act 1995 that will require mandatory jail terms to be imposed in certain circumstances. Clause 175 makes a number of amendments to the Criminal Code 1913 to introduce a new chapter titled "Facilitating activities of criminal organisations". This chapter sets up two new offences in the code—clause 221E, "Participating in or contributing to an activity of a criminal organisation for the purpose of enhancing the ability of the criminal organisation to facilitate or commit

an indictable offence" and clause 221F, "Instructing commission of offence for benefit of, or at the direction of or in association with the criminal organisation". It introduces a penalty of two years' imprisonment for the former and 20 years' imprisonment for the latter.

Some minor changes are also being made to the Criminal Investigation Act 2006 to provide police officers with additional search powers if they reasonably suspect someone is a person subject of a control order and is prohibited from possessing certain things. Clause 177 amends the Criminal Investigation (Identifying People) Act 2002 to allow identifying information obtained under that act to be disclosed for the purposes of the Criminal Organisations Control Act.

Not surprisingly, the final policy initiative of the government implemented in this bill concerns amendments to criminal property confiscation legislation. Clause 178 amends the Criminal Property Confiscation Act 2000. The first change, which is to section 141, defines any offence committed or suspected of being committed by a person under a control order as a "confiscation offence". This includes the offence provisions in the bill. The second change, which is to section 148, extends the definition of "crime derived" property to cases in which a person who is a member of a declared criminal organisation is convicted of a confiscation offence. The effect of the amendment is that it is presumed that the property the person owns or effectively controls at the time of the commission of the offence is crime derived unless the person establishes to the contrary. Finally, a rewritten section 159(2)(a), in conjunction with changes made to the Misuse of Drugs Act 1981 contained in clause 181 of this bill, introduces a category of drug offences which, if committed by a person who is a member of a declared organisation, means that the offender is automatically taken to be a declared drug trafficker.

In closing and summarising the policy intent of this bill, I will quote a few lines from an article I wrote for *The West Australian* on 27 June —

> Simply put, the Government's sole and primary objective with these laws will be to use every legislative means available to ensure the police and courts are legally equipped to disrupt organised crime networks, fill our jails with people who engage in organised crime and confiscate their property to the point where it will not be profitable for these organisations to openly exist in WA.

I very much hope that this bill does just that, but in a way that balances individual civil liberties and the public interest. This is what this bill strives to achieve by paying particular attention to the recent decisions of the High Court of Australia. I will end with another quote from the same article —

> This Government is absolutely committed to these laws because we consider that the public interest demands that people who associate for the purposes of engaging in violence, intimidation and organised criminal activity are disrupted, imprisoned, stripped of their property and forced out of this jurisdiction.
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> We intend to pursue these goals with every legislative and administrative means at our disposal.

The bill I present today represents the legislative response of government to this large and pervasive problem. I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.